Supreme Court, U.S.
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NO. 09-878

In The Supreme Court of the United States

NICANDRO UCCIFERRI,

Petitioner,

vs.

RODNEY CHANDLER, Warden Big Spring Correctional Institution,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Law Office of Michael B. Cohen
35 E. Wacker Drive, Suite 900
Chicago, IL., 60601
(312) 726-0739
Counsel for Petitioner

QUESTION PRESENTED

I. May a federal prisoner who is actually innocent because he has been erroneously convicted of an nonexistent offense invoke 28 U.S.C. Section 2241 as a vehicle to obtain his release from confinement, even though, he cannot meet the criteria to invoke the so called savings clause contained in 28 U.S.C. Section 2255 announced by the Fifth Circuit in ***Reyes-Requena v. United States,*** 243 F.3d 893, 900 (5thCir, 2001).

PARTIES INVOLVED

All parties who have an interest in the outcome of this case appear on the caption of the case on the cover of this Petition.

TABLE OF CONTENTS

Page

Questions Presented..... i

Parties Involved..... .i

Table of Contents..... .ii

Table of Authorities.....iii

Judgment and Opinion Below.....1

Jurisdictional Statement 1

Constitutional and Statutory Provisions..... 2

Statement of the Case 3

Reasons for Granting Certiorari.....6

Summary of Argument.....6

Argument.....8

Conclusion.....15

Table of Contents to Appendices.....16

TABLE OF AUTHORITIES

Cases cited: **Page**

Anders v. California,
386 U.S. 738 (1967).....4

Brandon v. 30th Judicial Circuit Court of Kentucy,
410 U.S. 484 (1973).....8

Bousley v. United States,
523 U.S. 614 (1998).....7

Cooper v. United States,
199 F.3d 898 (7th Cir. 1999).....15

Dodd v. United States,
545 U.S. 353 (2005).....13

Felker v. Turpin,
518 U.S. 651 (1996).....8

Herrera v. Collins,
506 U.S. 390 (1993).....11,12

Medina v. California,
505 U.S. 437 (1992).....11

Moralez v. Bezy,
496 F.3d 668 (7th Cir. 2007).....14

Murray v. Carrier,
477 U.S. 478 (1986).....7, 14

TABLE OF AUTHORITIES

Cases cited: **Page**

Pottinger v. City of Miami,
810 F.Supp. 1551 (S.D. Fla. 1992).....11

Price v. Johnston,
334 U.S. 266 (1948).....9, 10

Robinson v. California,
370 U.S. 660 (1962).....6

Reyes-Requena v. United States,
243 F.3d 893 (5th Cir. 2000).....2, 13

Schlup v. Delo,
513 U.S. 298 (1995).....11, 12

United States v. Clavis,
956 F.2d 1079 (11th Cir. 1992).....4, 6, 10, 14

United States v. Hayman,
343 U.S. 205 (1952).....8

Statues Cited:

28 U.S.C. § 2241.....5,6,7,9,13,14
28 U.S.C. § 2255.....4,7,8,9,10,11,12,13,14
21 U.S.C. § 856(A)(1).....3,4,6,7,12,13,14
18 U.S.C. § 2.....3,4,7

Constitutional Provisions cited:

Fifth Amendment Due Process Clause.....10,11,12
Eight Amendment.....10,11

PETITION FOR WRIT OF CERTIORARI

Petitioner, Nicandro Ucciferri, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on October 20, 2009.

JUDGMENT AND OPINION BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 20, 2009 and it is unreported. A copy of the unreported judgment is reproduced in Appendix "A" of this Petition at Page No. A-1.

JURISDICTION

The court of appeals issued its judgment on October 20, 2009. Petitioner did not file a Rule 35 Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. Section 2241. Power to grant a writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit court judge within their respective jurisdictions. The order shall be entered in the records of the district court of the district wherein the restraint complained of is had.

* * * * * *

(c) The writ of habeas corpus shall not extend to a prisoner unless —

* * * * * *

(3) He is custody in violation of the Constitution or laws of the United States.

2. The so called "savings clause" announced by the Fifth Circuit in ***Reyes-Requena v. United States,*** 243 F.3d 893, 904 (5th Cir. 2001), which allows a federal prisoner to bring a writ of habeas corpus under §2441, if the § 2255 remedy is "inadequate or ineffective" to test the legality of his detention if the Petitioner's claim is: (i) based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a non-existent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trialm appeal or first § 2255 motion.

3. The 5th Amendment to the U.S. Constitution which provides that no person shall be * * * * deprived of life, liberty, or property without due process of law.

STATEMENT OF THE CASE

On December 11, 2002, a federal grand jury sitting in the Middle District of Florida, Orlando Division, indicted Petitioner for maintaining a building for the purpose of unlawfully manufacturing marijuana in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2. Said indictment was docketed as criminal Case No. 6:02-CR-191-ORL-19-JGG, (M.D. Fla.) This indictment was subsequently consolidated with another criminal case docketed as Case No. 6:01-CR-149-ORL-19-JGG, (M.D. Fla.), which charged Petitioner and others with engaging in a drug conspiracy and money laundering offenses.

On January 22, 2003, during the afternoon of the second day of Petitioner's trial to the charges alleged in Case No. 6:01-CR-149-ORL-19-JGG, and after it became apparent that a mistrial was going to be declared, Petitioner agreed to plead guilty to the charges alleged in Case No. 6:02-CR-191-ORL-19-JGG, which charged Petitioner with 1-count of violating 21 U.S.C. 856(a)(1) and 1-count of violating 18 U.S.C. § 2, with the understanding that the government would dismiss all charges alleged against Petitioner in Case No. 6;)1-CR[149-ORL-19-JGG. On said date the district court held a Rule 11 hearing and Petitioner was adjudged guilty of 1-count which alleged a violation of 21 U.S.C. § 856(a)(1) and 1-count which alleged a violation of 18 U.S.C. § 2.

On April 23, 2003, the district court imposed a 151-month of imprisonment upon Petitioner. A timely notice of appeal was filed in the district court and the appeal was docketed in the Eleventh

Circuit Court of Appeals at Docket No. 03-12881-BB. However, new court appointed counsel filed a no merits brief under ***Anders v. California,*** 386 U.S. 738, (1967). The 11th Circuit Court of Appeals subsequently dismissed Petitioner's direct appeal and issued its mandate on March 9, 2004.

On April 28, 2005, Petitioner filed a pro se motion under 28 U.S.C. § 2255. Said motion alleged, inter alia, (1) that his trial counsel rendered constitutionally ineffective assistance of counsel by advising Petitioner to plead guilty to conduct which did not constitute a criminal violation of 21 U.S.C. § 856(a)(1) or 18 U.S.C. § 2; and (2) that under the 11th Circuit's holdings pronounced in ***United States v. Clavis,*** 956 F.2d 1079 (11th Cir. 1992), Petitioner was factually and legally innocent of violating 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2, on the grounds that no amount of marihuana had ever been manufactured or distributed out of the home which served as the basis of the § 856(a)(1) offense.

On May 9, 2006, the district court without even addressing Petitioner's claim of actual innocence under the holdings pronounced in ***Clavis,*** supra, entered an order denying Petitioner's Section 2255 motion,[1] and on July 6, 2006, also entered an order denying Petitioner's application for a Certificate of Appealability.

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1. The district court's order denying Petitioner's section 2255 motion is devoid of any reference being made to ***United States v. Clavis,*** 956 F.2d 1079 (11th Cir. 1992) which pronounced the necessary elements of § 856(a)(1) offense to properly convict a defendant

Petitioner then filed a counseled application for a COA with the 11th Circuit Court of Appeals. On September 11, 2006, a one-judge order was entered denying Petitioner's application for a COA. A timely motion for reconsideration of the one-judge order was filed, however, on October 24, 2006, a two-judge panel denied said motion. Petitioner then sought a COA from this Court, however, on January 25, 2007, Justice Thomas denied Petitioner's application for a COA.

On June 23, 2008, Petitioner filed a counseled habeas corpus petition under 28 U.S.C. Section 2241 in the Northern District of Texas which named Warden Rodney Chandler, his custodian as the Respondent. A show cause order was entered by the district court directing the Respondent to file an answer to Petitioner's section 2241 petition.

After the matter had been fully briefed, the district court entered an order on December 22, 2008, granting Respondent's Motion to dismiss Petitioner's section 2241 for want of jurisdiction. (See copy of the order included in the Appendix at "B").

On January 20, 2009, Petitioner filed a timely notice of appeal with the clerk of the district court. Said appeal was docketed in the Fifth Circuit Court of Appeals as Appeal No. 09-10074. After the matter had been fully briefed, the Fifth Circuit Court of Appeals entered an on October 20, 2009, affirming the district court's dismissal of Petitioner's section 2241 petition for want of jurisdiction. (See copy of the unpublished decision contained in Appendix "A" of this petition).

REASONS FOR GRANTING CERTIORARI

Summary of Argument

Something important is at stake in this case. On the surface, the question is whether a federal prisoner may have access to the courts to gain his release from confinement by filing a habeas corpus petition under 28 U.S.C. § 2241. More fundamentally, the question is whether the government can continue to imprison a man after it has been established that the statute under which he has been convicted and sentenced does not reach the behavior in which he engaged. Under the most basic principles of due process, the government must justify depriving any person of liberty. In this instance, the government has no legitimate penal justification for imposing a criminal penalty on a man for a crime he did not commit.

Although, the government may fairly ascribe Petitioner's conviction and sentence to an honest (though seriously mistaken) construction of 21 U.S.C. § 856(a)(1), by the prosecutor(s) who prosecuted the Petitioner. Nonetheless, under the holdings pronounced in ***United States v. Clavis,*** 956 F.2d 1079, 1090 (11th Cir. 1992), it is perfectly clear that the district court, the prosecutor and Petitioner's court appointed counsel were unaware of the necessary elements of a § 856(a)(1) offense to properly convict a defendant of said offense.

Moreover, Petitioner's plea of guilty does not foreclose his claim of actual innocence because he was mistakenly led to believe that he could be convicted of violations of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2 even though no amount of marihuana had ever been produced or distributed out of the home which served as the basis for the § 856(A)(1) offense.

In addition, this Court held in ***Bousley v. United States,*** 523 U.S. 614, (1998), that when a district court misinforms a defendant about the essential elements of the crime charge, the resulting plea is constitutionally invalid. **See *Bousley,*** 523 U.S. at 618-19, 118 S.Ct. at 1609. In this case, based on the extant record, there is no doubt that the district court misinformed Petitioner about the essential elements of a § 856(a)(1) offense.

Therefore, this is quintessentially "an extraordinary case" in which a mistake has "probably resulted in the conviction" of an innocent person. ***Murray v. Carrier,*** 477 U.S. 478, 496 (1986).

However, according to the 5th Circuit and the other Court of Appeals under the savings clause set forth in § 2255, an innocent person cannot use § 2241 as a vehicle to obtain habeas relief unless: (1) that claim is based upon a retroactively applicable Supreme Court decision; (2) the holding of that Supreme Court decision establishes the petitioner was convicted for a non-existent offense; and (3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion.

ARGUMENT

I. To date, this Court has not provided much guidance to the lower courts as to the factors that must be satisfied for a federal prisoner to file a habeas corpus petition under 28 U.S.C. § 2241 which is based upon a claim of actual innocence. This case presents this Court with an excellent opportunity to do so.

Under Section 2241, federal courts may issue writs of habeas corpus to federal or state prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). See ***Felker v. Turpin***, 518 U.S. 651, 659-669 & nn.1-2 (1996); ***United States v. Hayman***, 342 U.S. 205, 211-212 & n.11 (1952). A habeas petition must be filed in the district with jurisdiction over the defendant's custodian which is typically the jurisdiction where the defendant is imprisoned. See ***Brandon v. 30th Judicial Circuit Court of Ky.***, 410 U.S. 484, 494-495 (1973). Because a federal prisoner may be incarcerated far from the district in which he was convicted and sentenced, habeas corpus petitions filed by federal inmates can create serious administrative difficulties. See ***Hayman***, 342 U.S. at 213-214 & n. 18.

In 1948, Congress responded to these concerns by enacting 28 U.S.C. 2255. See ***Hayman***, 342 U.S. at 219. Section 2255 allows a federal prisoner to obtain collateral review of his conviction and sentence by filing a motion (rather than a habeas corpus petition) in the district where he was convicted and sentenced. 28 U.S.C. 2255 para. 1.

Section 2255 replaces the habeas corpus remedy in most case, providing that:

[a]n application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section [ ] shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

28 U.S.C. 2255 para.5. A habeas corpus petition challenging a federal prisoner's conviction can thus be brought under Section 2241 only if the prisoner can establish that Section 2255 is "inadequate or ineffective."

However, to decide what "adequacy" means (or, more realistically, what it should mean) in this context requires determining what the essential function of habeas corpus is and whether it is impaired by the limitation on its use of the remedy provided in section 2255. Based upon a prior decision of this Court, it appears that the essential function of habeas corpus is to give a prisoner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence. See, ***Price v. Johnston,*** 334 U.S. 266 (1948), wherein this Court in reversing a district court's decision to summarily dismiss a habeas corpus petition wrote:

"[W]e are not unaware of the many problems caused by numerous and successive habeas corpus

petitions filed by prisoners. But the answer is not to be found in repeated denials of petitions without leave to amend or without the prisoners having an opportunity to defend against their alleged abuses of the writ. That only encourages the filing of more futile petitions. The very least that can and should be done is to make the habeas corpus proceedings in district courts more meaningful and decisive, making clear just what issues are determined and for what reasons." ***Id.*** at 294.

In this case, as stated above at pg. 4,, the sentencing court's order denying Petitioner's § 2255 motion is devoid of any references related to Petitioner's claim of actual innocence based upon ***United States v. Clavis,*** 956 F.2d 1079 (11th Cir. 1992). Consequently, the sentencing court's failure to specifically address Petitioner's actual innocent claim raised in his § 2255 motion rendered his § 2255 motion inadequate for the reasons stated in ***Price v. Johnston.***

In addition, the failure of the 11th Circuit Court of appeals to grant Petitioner a COA to appeal the sentencing court's decision denying Petitioner's § 2255 motion precluded Petitioner from raising his claim of actual innocence on appeal.

Moreover, the continued incarceration of a person who is actually innocent may violate the Eight Amendment and raises a significant due process question. Justice Blackmum, writing for himself, Justice Stevens, and Justice Souter, has noted the possibility that the continued incarceration of an innocent person violates the Eight Amendment, and has suggested that, for that reason, such a person must have recourse to the

judicial system. See ***Herrera v. Collins,*** 506 U.S. 390, 432 n.2, 113 S.Ct. 853, 877 n.2, 122 L.Ed.2d 203 (1993). (Blackmum, J. dissenting) (explaining that it "may violate the Eight Amendment to imprison someone who is actually innocent" but declining to address the question, because the Court was "not asked to decide in this case whether petitioner's continued imprisonment would violate the Constitution if he actually is innocent"); id. at 432-33, 113 S.Ct. at 877 (arguing that, at least in capital cases, where a prisoner could not have raised his claim of innocence at an earlier time, the Eight Amendment mandates the availability of an avenue for collateral attack); cf. ***Robinson v. California,*** 370 U.S. 660, 667, 82 S.Ct. 1417, 1421, 8 L.Ed.2d 758 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.") ***Pottinger v. City of Miami,*** 810 F.Supp. 1551, 1565 (S.D. Fla. 1992) (finding that a person "may not be convicted under the eight amendment" of "innocent conduct").

In addition, this Court has stated that a procedural limitation "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." ***Medina v. California,*** 505 U.S. 437, 445, 112 S.Ct. 2572, 2577, 120 L.Ed.2d 353 (1992) (citations and internal quotations omitted). "[C]oncern about the injustice that results from the conviction of an innocent person has long been the core of our criminal justice system." ***Schlup v. Delo,*** 513 U.S. 298 (1995), 115 S.Ct. at 866. It is certainly arguable, therefore, that the continued imprisonment of an actually innocent person would

violate such a fundamental principle. Indeed, in ***Herrera,*** this Court assumed, without deciding that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no ....avenue open to process such a claim." ***Herrera,*** 506 U.S. at 417, 113 S.Ct. at 869. And in its pre-AEDPA "abuse of writ" cases, this Court repeatedly held that habeas and § 2255 would remain available to all prisoners — not just those facing execution — even absent a showing of cause for the failure to raise the issue at an earlier time, where the alleged error "has probably resulted in the conviction of one who is actually innocent." ***Murray v. Carrier,*** 477 U.S. 478, (1986). These cases provided prisoners with "a meaningful avenue to avoid a manifest injustice." ***Schlup,*** 513 U.S. at 327, 115 S.Ct. at 867.

It follows that a serious due process question arises when a court fails to address a claim of actual innocence as the sentencing court has done in this case when it failed to specifically address Petitioner's claim of actual innocence presented in Petitioner's original § 2255 motion.

Moreover, this is not a waiver case. The government has never proposed that the Petitioner was informed that he could be convicted and sentenced under 21 U.S.C. § 856(a)(1) only if he had actually produced or distributed some marihuana out of the home which served as the basis for the § 856(a)(1) offense. Nor has the government ever proposed that the Petitioner

nonetheless deliberately withheld an objection to suffering conviction on the basis of the behavior reflected in the record. If the Petitioner's claim is not cognizable in a § 2241 proceeding, it cannot be because he made an intelligent choice to forgo an objection he knew or should have known was open to him, but rather because the government's interest in preserving his conviction and sentence is so powerful that the Petitioner must forfeit a claim he most certainly did not waive.

However, under the savings clause contained in § 2555, Petitioner cannot raise his claim of actual innocence unless this Court renders a decision related to the necessary elements of a violation of 21 U.S.C. § 856(a)(1) which holds: (1) the production or distribution of some amount of marihuana are necessary elements to properly convict a defendant of a § 856(a)(1) offense and this decision is retroactive; (2) the holding also shows that a defendant who had been convicted of violating § 856(a)(1) without any amount of marihuana ever being produced or distributed has been convicted of a non-existent offense; and (3) circuit law squarely foreclosed such a claim at the time it otherwise should have been raised in the petitioner's trial, appeal or first § 2255 motion.

In the instant case, it is clear that the Petitioner will never be able to file a § 2241 Petition under the savings clause pronounced by the Fifth Circuit in ***Reyes-Requena v. United States,*** 243 F.3d 893 (5th Cir. 2000) for the following reasons:

Firstly, as noted by this Court in ***Dodd v. United States,*** 545 U.S. 353 (2005), this Court rarely holds that a decision is retroactive. Therefore, it appears that the Petitioner will never

be able to meet the first and second prongs of the savings clause contained in § 2255.

Secondly, ***Clavis v. United States,*** was decided in 1992. This decision set forth the necessary elements to sustain a conviction for a violation of 21 U.S.C. § 856(a)(1). Therefore, case law in the 11th Circuit did not foreclose Petitioner's claim of actual innocence. Moreover, Petitioner did not fail to raise ***Clavis*** in his § 2255 motion to support his claim of actual innocence in his § 2255 motion, rather, the sentencing court failed to address Petitioner's claim of actual innocence when it denied Petitioner's § 2255 motion on May 9, 2006. As stated above, at page-4, n.1., the sentencing court's order denying Petitioner's § 2255 motion is devoid of any references being made to the holding set forth in ***Clavis.***

Additionally, the sentencing court's error in failing to address Petitioner's claim of actual innocence was compounded by the 11th Circuit Court of Appeals when it denied Petitioner's application for a COA based upon a claim of ineffective assistance of counsel arising from counsel's failure to properly advise Petitioner of the necessary elements of a § 856(a)(1) offense which the government was required to prove to obtain a conviction for a violation of § 856(a)(1).

This Court has not provided much guidance to the lower courts when confronted with a case wherein a Petitioner has presented a prima facie case which shows that he has been convicted of a non-existent offense and has invoked § 2241 as the vehicle to obtain his release from confinement.

However, recently, Judge Rovner in her dissent in ***Moralez v. Bezy,*** 499 F.3d 668 (7th Cir. 2007)

citing ***Cooper v. United States,*** 199 F.3d 898, 901 (7th Cir. 1999) wrote "a conviction of a non-existent existent crime is "in anyone's book.....a clear miscarriage of justice," and as we have the authority to redress it, I see no reason why we should fail to do so at this time. Accordingly, I respectfully dissent."

Conclusion

For the reasons stated herein, the Court should grant the petition.

Respectfully submitted,

Michael B. Cohen

Michael B. Cohen
Attorney for Petitioner

Table of Contents to Appendices

Item: **Page**

Unpublished Opinion entered by the Fifth Circuit Court of Appeals dated October 20, 2009, affirming the district court's judgment dismissing Petitioner's Section 2241 petition for lack of jurisdiction.....A-1

Order entered by the district court dated December 22, 2008, dismissing Petitioner's Section 2241 petition for lack of jurisdiction...B-1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-10074
Conference Calendar

NICANDRO P. UCCIFERRI,

Petitioner-Appellant

v.

RODNEY CHANDLER, Warden Big Spring Federal Correctional Institution,

Respondent-Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:08-CV-131

Before WIENER, BENAVIDES, and STEWART, Circuit Judges. PER CURIAN: *

Nicandro P. Ucciferri, federal prisoner # 10339-018, appeals the dismissal for lack of jurisdiction of his 28 U.S.C.§ 2241 petition challenging his sen-

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not binding precedent except under the limited circumstances set forth in 5th Cir. R, 47.5.4.

tence for maintaining a building for the purpose of manufacturing marihuana. Ucciferri argues that he is actually innocent, having been convicted of conduct that did not constitute a federal criminal offense.

Ucciferri may bring this claim in a § 2241 proceeding only by demonstrating under the "savings clause" that the 28 U.S.C. § remedy would be "inadequate or ineffective." *Reyes-Requena v. United States,* 243 F.3d 893, 900 (5th Cir. 2001). "[T]he savings clause of § 2255 applies to a claim (i) that is based on a retroactively applicable Supreme Court decision which established that the petitioner may have been convicted for a non-existent offense and (ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." *Id.* at 904. Conceding that his actual innocence claim meets neither prong of the *Reyes-Requena* test, Ucciferri nevertheless urges us to hold the savings clause inapplicable under the facts of his case. The *Reyes-Requena* actual innocence test, however, is binding precedent in this circuit. *See Wesson v. U.S. Penitentiary Beaumont, TX,* 305 F.3d 343, 347 (5th Cir. 2002); *see also In re Brown,* 457 f.3D 392, 394 N.1 (5TH Cir. 2006).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

NICANDRO UCCIFERRI

Petitioner,
v.

Civil Action No,
5:08-CV-131-C
ECF

RODNEY CHANDLER, Warden,

Respondent.
_____/

ORDER

Petitioner Nicandro Ucciferri filed a petition fro writ of habeas corpus pursuant to 28 U.S.C. § 2241 on June 23, 2008. Respondent filed a Response to petition for Writ of Habeas Corpus and Motion to Dismiss with a lengthy index containing copies of Petitioner's relevant criminal records on September 2, 2008. Petitioner filed a reply and objections to the motion to dismiss on September 23, 2008.

Petitioner is currently incarcerated in the Federal Correctional Institution at Big Spring, Texas pursuant ao a judgment and sentence from the United States District Court for the Middle District of Florida, Orlando Division, in Criminal No. 6:02-CR-191-ORL-19KRD. In that cause number, Petitioner pleaded guilty to one count of maintaining a building for the purpose of manufacturing marijuana in violation of 21 U.S.C. § 856(a)91) and 18 U.S.C. § 2 on January 22, 2003. He was sentenced to 151 months' incarceration in the Bureau of prisons, to be followed by a two-year term of supervised release on April 23, 2003. Athough, Petitioner filed a direct appeal the

Eleventh Circuit Court of Appeals dismissed the appeal and issued its mandate on March 9, 2004.

Petitioner filed a *pro se* motion to vacate, set aside, or correct his sentence in the sentencing court on July 6, 2005, and it was assigned Civil Action No. 6:05-645-ORL-19JGG. The motion was dismissed with prejudice by Order dated May 9, 2006. The Eleventh Circuit Court of Appeals denied Petitioner's request for a certificate of appealabilty on September 11, 2006 (USCA No. 06013762-E). Petitioner filed a motion for rehearing, but it was denied on October 24, 2006. Although Petitioner contends that he filed a request for a certificate of appealability with "Justice Thomas," there is no indication on the dockets of Criminal No. 6:02-CR-191-ORL-19KRS or Civl Action No. 6:05-CV-ORL-19JGG that it was filed or denied.

In the instant petition, Petitioner contends that he is actually innocent of the offense and should be released immediately. He bases his innocence on the decision in *United States v. Clavis,* 956 F.2d 1079 (11th Cir. 1992), and argues that this Court has jurisdiction to consider the issue under the savings clause of 28 U.S.C. § 2241.

The United States Court of Appeals for the Fifth Circuit has determined that

> [a] writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 are distinct mechanisms for seeking post-conviction relief. A section 2241 petition on behalf of a sentenced prisoner attacks the manner in which a sentence is carried out or the prison authorities' determination of its duration, and must be filed in the same district where the prisoner is incarcerated. A section 2255 motion by contrast, "provides the primary means of collateral attack on a federal sentence." Relief under section 2255 is warranted for errors cognizable on

collateral review that occurred "at or prior to sentencing." a section 2255 motion must be filed in the sentencing court. *Pack v. Yusuff,* 218 F3d 448 (5th Cir. 2000) (quoting *Cox v. Warden, Federal Detention Ctr.,* 911 F.2d 1111, 1113 (5th Cir. 1990)) (internal citations omitted). *See Tolliver v. Dobre,* 211 F.3d 876, 877 (5th cir. 2000) (holding that "[28 U.S.C.] § 2255 is the primary means of attacking a federal sentence, "but "[28 U.S.C.] § 2241 is used to attack the manner in which the sentence is executed"). *See Tolliver v. Dobre,* 211 F.3d 876, 877 (5th Cir. 2000) (holding that "[28 U.S.C.] § 2255 is the primary means of attacking a federal sentence, 'but "[28 U.S.C.] § 2241 is used to attack the manner in which the sentence is executed").

"[A] section 2241 petition that seeks to challenge a federal sentence or conviction – thereby effectively acting as a section 2255 motion — may be entertained when the petitioner establishes that the remedy provided under section 2255 is inadequate or ineffective," *Pack v. Yusuff,* 218 F.3d at 452, but this "savings clause" applies only to a claim that is (1) "based on a retroactively applicable Supreme Court decision which establishes that the petitioner may have been convicted of a non-existent offense" and (2) "was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first § 2255 motion." *Reyes-Requena v. United States,* 243 F.3d 904 (5th Cir. 2001). The Fifth Circuit has made clear that § 2241 is not a mere substitute for § 2255 and ....the inadequacy or inefficacy requirement is stringent." *Id.* at 901. *See pack v. Yusuff,* 218 F.3d at 452 (holding that the § 2255 remedy may be found ineffective or inadequate "only in extremely limited circumstances"). Furthermore, the petitioner bears the burden of proving the inadequacy or ineffectiveness of a § 2255 motion. *Id. Pack v. Yusuff,* 218 F.3d at 452.

Neither a prior unsuccessful § 2255 motion nor the inability to meet the § 2244(b)(3)'s second or successive motion requirement renders § 2255 inadequate or

ineffective. *Jeffers v. Chandle,* 253 F.3d 827, 830 (5th Cir. 2001). Indeed, "[a] ruling that section 2255 remedy was inadequate or ineffective, such that a petitioner could invoke section 2241, simply because the petitioner's prior section 2255 motion was unsuccessful, or barred, or because he could not file another motion, would render those procedural requirements a nullity and defy Congrees's cler attempt to limit successive habeas petitions." *Pack v. Yusuff,* 218 F.3d at 453.

Although Petitioner seeks to file this complaint under 28 U.S.C. § 2241, he is raising claims which challenge the validity of his federal sentence and are more properly raised in a motion under § 2255. *See Kinder v. Purdy,* 222 F.3d 209, 212 (5th Cir. 2000) (finding that although petitioner characterized his claim as a challenge to the legality of his detention under § 2241, he was actually challenging the manner in which his sentence was determined and the claim had to be raised in a motion under §2255). Because Petitioner was sentenced in the United States District Court for the Middle District of Florida, Orlando Division, this Court is without jurisdiction to hear Petitioner's claims or to construe his petition under § 2255. *See Ojo v. Immigration and Naturalization Service,* 106 F.3d 680, 683 (5th Cir. 1997) ("Although a § 2241 petition attacking matters within the province of § 2255 should be construed as a § 2255 petition.....a court without jurisdiction to hear a § 2255 petition can hardly be expected to do that.").

Moreover, Petitioner has not demonstrated that his remedies under § 2255 were "inadequate or ineffective" and he has not demonstrated that his claim of innocence is based on a retroactively applicable Supreme Court decision which establishes that he may have been convicted of a nonexistent offense or that the claim was foreclosed by circuit law at the time of his guilty plea, appeal, and first § 2255 motion. *Reyes-Requena v. United States,* 243 F.3d 893. Indeed, Petitioner concedes that the Eleventh Circuit

Court of Appeals decided *United States v. Clavis, supra,* in 1992 well before Petitioner pleaded guilty in 2003.

For these reasons and the reasons set forth in the Respondent's well-drafted Response and Motion to Dismiss, the Court finds that Respondent's Motion to Dismiss should be granted and the instant petition dismissed for want of jurisdiction.

SO ORDERED.

All relief not expressly granted is denied and any pending motions are hereby denied.

Dated December 22, 2008.

Sam R. Cummings
United States District Court